REDBERRY AMBIENT SDN BHD
v. TRIBUNAL RAYUAN KASTAM & ANOR

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
MOHD NAZLAN GHAZALI JCA
CHOO KAH SING JCA
[CIVIL APPEAL NO: W-01(A)-162-03-2023]
22 APRIL 2024

Abstract – *(i) No matter how parties label and arrange their business relationship, if, under the law, it amounts to the provision of advertising services under the Service Tax Act 2018 and the Service Tax Regulations 2018, then it is taxable; (ii) The scope of the actual authority of an agent is to be ascertained from the terms of the agreement between the principal and the agent. Pursuant to s. 139 of the Contracts Act 1950, the authority of an agent may be expressed or implied.*

CUSTOMS & EXCISE: *Goods and services – Tax – Service tax – Rental agreement – Provider of digital and cinema advertising services entered into agreement with cinema – Renting by service provider of advertising space at cinema's multiplexes to place service provider's customers' advertisements – Whether provision of digital advertising space and airtime services amounted to advertising service – Whether subject to service tax – Service Tax Act 2018 – Service Tax Regulations 2018*

CONTRACT: *Agreement – Rental agreement – Terms and conditions – Interpretation – Provider of digital and cinema advertising services entered into agreement with cinema – Renting by service provider of advertising space at cinema's multiplexes to place service provider's customers' advertisements – Rental charged by cinema subject to service tax – Whether pure rental agreement – Whether cinema was providing 'advertising services' to service provider as service provider was merely agent of cinema subject to cinema's control – Whether cinema retained control over advertising services – Whether revenue-sharing mechanism showed advertising services*

CONTRACT: *Agency – Principal and agent – Provider of digital and cinema advertising services entered into rental agreement with cinema – Renting by service provider of advertising space at cinema's multiplexes to place service provider's customers' advertisements – Whether mere rental agreement – Whether service provider agent of cinema subject to cinema's control – Whether cinema retained control over advertising services – Whether revenue-sharing mechanism showed advertising services – Contracts Act 1950, s. 139*

The appellant, a provider of digital and cinema advertising services, had entered into an agreement with TGV Cinemas ('TGV') which, according to the appellant, was essentially for the renting by the appellant of the advertising space at TGV's multiplexes to place the appellant's customers' advertisements. TGV, in consideration, issued invoices and charged 6% service tax to the appellant for the payment of sum payable under the agreement. In 2020, the appellant wrote to the Bahagian Cukai Dalam Negeri (SST) to obtain confirmation in respect of the service tax treatment for the said rental of advertising space by TGV to the appellant. The response confirmed that the rental charged by TGV to the appellant was indeed subject to service tax. This prompted the appellant to file a review, pursuant to s. 81(1) of the Service Tax Act 2018, which was dismissed by the Director General of Customs ('second respondent'). The appellant's appeal to the Customs Appeal Tribunal ('first respondent') was also dismissed; the first respondent maintained the second respondent's ruling that the letting of advertising space by TGV to the appellant, based on the arrangement reflected in the agreement, was subject to service tax ('first respondent's decision'). The appellant's appeal to the High Court, against the first respondent's decision, bore no success. Hence, the present appeal. The issues that arose for adjudication were: (i) whether TGV was providing 'advertising services' to the appellant as the appellant was merely an agent of TGV who was subject to TGV's control; (ii) whether TGV retained control and whether such indicated advertising services; and (iii) whether revenue-sharing mechanism showed advertising services.

Held (dismissing appeal)

Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:

(1) In order to ascertain the true nature of the business transaction between TGV and the appellant, for all intents and purposes, reliance must be principally had on the terms of the agreement. Despite the appellant's insistence that the arrangement was merely the rental of advertising space from TGV, even on a cursory review of the agreement, the same was not a typical rental agreement. In fact, the word 'rental' was not used in the agreement at all. There were, however, references to the letting out of advertising space which was specifically identified but there was, no less, focus on provisions concerning media sales sharing ratio, minimum guarantee payments to TGV and the provision of corporate and bank guarantees in favour of TGV. The agreement also, crucially, provided for the appointment of the appellant as the sole agent of TGV. (paras 24, 26 & 27)

(2) The features and degree of control must be carefully scrutinised, including such as whether they relate to either merely administrative or substantive business controls; each case would have to be examined on

its own peculiar facts. Here, there was a number of features that exhibited the involvement of TGV as the media owner, on top of TGV's appointment of the appellant as its agent, beyond the usual role of an owner merely letting out its advertising space. This, in turn, almost inevitably signified the involvement of TGV in the provision of the advertising services itself. The terms of the agreement did not support the appellant's position that it was not acting as TGV's agent to get advertisers. Instead, the agreement provided that TGV did not relinquish control of digital advertising space and airtime. (paras 64, 66 & 67)

(3) The arrangement was not merely rental and features such as the revenue-sharing mechanism, which was so explicitly drafted into the agreement in comparison to the conspicuous absence of any standard provisions on rentals, further bolstered the case of the second respondent, as affirmed by the first respondent, that TGV also provided advertising services. Essentially, the agreement provided that all media sales received by the appellant from the advertisers must be shared with TGV, in ratios favourable to TGV, with a guarantee entitlement for TGV in respect of such sales to be not less than RM12 million for each quarter during the three-year term of the agreement. The fact that there was a revenue-sharing mechanism between TGV and the appellant therefore signified that there were advertising services provided by TGV that entitled them to the revenue. Thus, it was not a fixed rental fee in a pure rental agreement. (paras 74 & 78)

(4) The respondents did not misconstrue the agreement. There was no error of law in arriving at the first respondent's decision that the provision of digital advertising space and airtime services by TGV amounted to advertising service under Item 8, Group 1 of the First Schedule to the Service Tax Regulations 2018, based on the proper interpretation of the terms and conditions of the agreement. The decision of the High Court was affirmed. (paras 89 & 90)

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Ketua Pengarah Kastam v. Metrogold Commercial Sdn Bhd [2023] CLJU 2612; [2023] 1 LNS 2612 CA ***(refd)***

Michael C Solle v. United Malayan Banking Corp Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***

NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***

Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786 CA ***(refd)***

The Antaios Compania Neviera SA v. Salen Rederierna AB [1985] AC 191 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 139
Customs Act 1967, s. 141W
Rules of Court 2012, O. 55A r 1
Service Tax Act 2018, ss. 2(1), 7(a), 8, 13, 81(1), 91
Service Tax Regulations 2018, r. 3 First Schedule, Item 8

For the appellant - Nicholas Mark Pereira & Sarah Aina Mohd Rehan; M/s Juen, Jeat, Nic & Nair
For the respondent - Norjamilah Shuhadah Tohet & Muhaimin Mohamed; SFC

[Editor's note: For the High Court judgment, please see Redberry Ambient Sdn Bhd v. Tribunal Rayuan Kastam & Anor [2023] CLJU 1441; [2023] 1 LNS 1441 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali JCA:

Introduction

[1] This is an appeal against the judgment of the High Court which had dismissed the appellant's appeal against the decision of the first respondent tribunal affirming the decision of the second respondent imposing service tax on an advertising arrangement involving the appellant.

[2] Having heard the appeal, examined the appeal records and considered the submissions by parties, we unanimously decided to affirm the decision of the High Court, and therefore dismiss the appeal, for the reasons which we set out herein.

Key Background Facts

[3] The appellant, Redberry Ambient Sdn Bhd (formerly known as Focus Media Network Sdn Bhd (FMN)) provides digital and cinema advertising services and is registered under s. 13 of the Service Tax Act 2018 ("the STA") effective 1 September 2018. It thus charges 6% service tax to its customers on the services provided.

[4] The first respondent is the Customs Appeal Tribunal and the second respondent is the Director General of Customs ("the DG of customs").

[5] The appellant had entered into an agreement with TGV Cinemas Sdn Bhd ("TGV") dated 1 January 2018 ("the agreement"), which according to the appellant was essentially for the renting by the appellant of advertising space at TGV's multiplexes to place the appellant's customers advertisements.

[6] TGV in consideration issues invoices and charges 6% service tax to the appellant for the payment of the sum payable under the agreement.

[7] On 8 May 2020, the appellant wrote to the Bahagian Cukai Dalam Negeri (SST) to obtain confirmation in respect of the service tax treatment for the said rental of advertising space by TGV to the appellant. The response came on 2 June 2020 which however, confirmed that the rental charged by TGV to the appellant is subject to service tax.

[8] This led the appellant filing a review application under s. 81(1) of the STA which however, was dismissed by the second respondent – the DG of Customs, on 23 October 2020. The appellant then filed an appeal on 18 November 2020 to the first respondent – the Customs Appeal Tribunal, which in turn in its Form G dismissed the appeal. Thus, the first respondent's decision ("the impugned decision") is to maintain the second respondent's ruling that the letting of advertising space by TGV to the appellant based on the arrangement reflected in the agreement is subject to service tax.

[9] The appellant then proceeded to invoke the provision of O. 55A r. 1 of the Rules of Court 2012 – concerning appeals to High Court under written law – and s. 141W of the Customs Act 1967 (which permits any person aggrieved by the decision of the Customs Appeal Tribunal to appeal to the High Court on a question of law or of mixed law and fact) to appeal against the impugned decision of the first respondent to the High Court by way of an originating summons.

[10] Essentially, the appellant had sought a declaration that first, the impugned decision be set aside, and secondly, that the services provided by TGV to the appellant under the agreement for the rental of advertising space was not subject to service tax under the STA, such that the sum of RM352,491.78 paid to the Royal Malaysian Customs Department ("the RMCD") for such purpose be refunded to the appellant, together with interest. This was again, dismissed on 14 March 2023, by the High Court, thus affirming the first respondent's impugned decision. Hence, the appeal now before us.

Grounds Of Appeal

[11] In its memorandum of appeal, the appellant listed the reasons for appealing, as reproduced follows:

> (1) The learned Judge erred in law and/or fact in dismissing the Appellant's appeal against the decision of 1st Respondent (*ie*, the Customs Appeal Tribunal) that the services provided by TGV Cinemas Sdn Bhd ("TGV") to the Appellant under the agreement between the Appellant and TGV ("agreement") for the rental of the advertising space ("Services") amount to "advertising services" which are subject to service tax under the Service Tax Act 2018 ("STA"). In particular:

A

1.1. the learned Judge failed to appreciate that the form and substance of the agreement are that the Appellant is renting advertising space from TGV and that the Appellant is neither receiving any advertising services from TGV nor providing any advertising services to customers as TGV's agent;

B

1.2. the learned Judge failed to appreciate that as consideration for the rental, the Appellant pays TGV a base/minimum fee of RM12,000.00 (which is payable where there are any sales or not) plus a performance rental based on sales (which is payable only if the revenue hits a certain threshold);

C

1.3. the learned Judge failed to appreciate that there is no legal basis for the difference in service tax treatment between a rental of digital advertising space and non-digital advertising space - taking such a view would lead to absurd and unfair results;

1.4. the learned Judge failed to appreciate that the neither STA and the Service Tax Regulations 2018 ("STR") do not prescribe rental

D

services as a taxable service subject to service tax;

1.5. the learned Judge failed to appreciate that the 1st Respondent committed a blatant error of law and fact in coming to the conclusion that the Services amount to "advertising services" because the Appellant is acting as TGV's agent and TGV has control

E

over the Appellant; and

1.6. the learned Judge failed to appreciate that both the 1st Respondent and the 2nd Respondent have imposed their own requirement/ condition which is not expressly stated in the STA and STR, and that the 1st Respondent and 2nd Respondent have therefore acted

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ultra vires, illegaly and without jurisdiction.

[12] The appellant, subsequently, in a supplemental memorandum of appeal added more grounds for the appeal after the full grounds of judgment of the High Court were made available, as follows:

G

(1) The learned Judge erred in finding that the 2nd Respondent considered that substance of the agreement before coming to the conclusion that the payments under the agreement, whether termed as 'fixed rental fee' or 'performance rental fee' is subject to service tax.

H

(2) The learned Judge failed to appreciate that the 2nd Respondent himself accepted that the agreement is a rental agreement and that TGV charges rental in the form of 'fixed rental fee' and 'performance rental fee'. The learned Judge also failed to appreciate that the 2nd Respondent's witnesses before the 1st Respondent accepted this.

I

(3) The learned Judge failed to appreciate that "digital advertising" was only taxable under Item 8, Group I of the STR with effect from 01.01.2020, which is before the 2nd Respondent came to the conclusion that the services under the agreement are "advertising services" which are subject to service tax.

(4) The learned Judge erred in fact and/or law in coming to the conclusion that the agreement is "couched" in the form of rental agreement but is in essence the provision of "advertising services" by TGV to the Appellant.

(5) The learned Judge erred in fact and/or law in finding that the terms and conditions of the agreement were "peculiar" and was different from the example given in the Royal Malaysian Customs Department's Guide on Advertising Services. In particular, the learned Judge failed to appreciate that is it common for a rental agreement to have a fixed rent plus a variable top-up which is calculated on sales/revenue.

Analysis & Findings Of This Court

The Governing Provisions – In Summary

[13] By virtue of s. 7(a) of the STA, service tax is charged and levied on any taxable service in Malaysia by a registered person in carrying on his business. Section 2(1) of the STA defines 'taxable service' to mean any service which is prescribed to be taxable service under s. 8 of the STA. Section 8 empowers the Minister of Finance to prescribe a service to be a taxable service.

[14] In this regard, the Minister has made regulations known as the Service Tax Regulations 2018 ("the STR") pursuant to s. 91 of the STA. According to reg. 3 of the STR, taxable persons and taxable services and the total value of taxable services shall be as specified in the First Schedule to the STR. Item 8, Group I (Other Service Providers) of the First Schedule to the STR provides the taxable person as:

Any person, Government agency, local authority or statutory body who provides advertising services.

Taxable service is stated to be as follows:

Provisions of all types of advertising services including digital advertising services, excluding provision of such services for promotion outside Malaysia.

And with the threshold of the total value of taxable services specified to be at RM500,000.

Whether TGV Is Providing "Advertising Services" To The Appellant As The Appellant Is Merely An Agent Of TGV Who Is Subject To TGV's Control

[15] It is not in dispute that the appellant (as opposed to TGV) provides taxable services under the STA and was registered for the purposes of the STA with effect from 1 September 2018. It provides its services to its customers by renting advertising space from vendors to place the

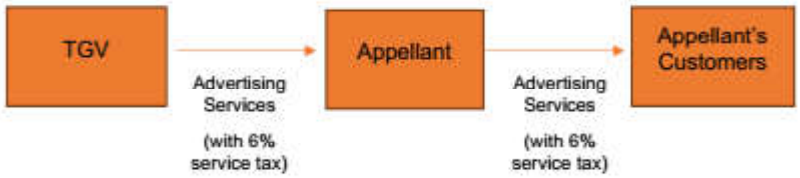
advertisements of its customers. The appellant charges 6% service tax to its customers on the digital and cinema advertising space from vendors to place the advertisements of the appellant's customers.

[16] As for TGV though, the High Court agreed with the position taken by the respondents in the impugned decision that the services provided by TGV to the appellant under the agreement too constituted "advertising services" subject to service tax.

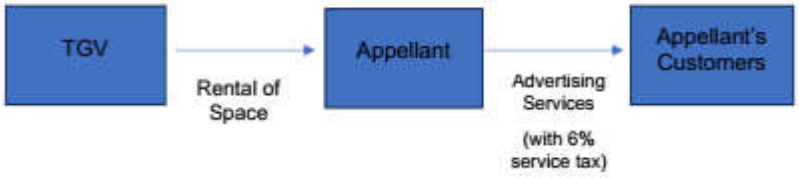
[17] In order to address this key issue, from the grounds of appeal filed by the appellant and its written submissions, we identify a number of other related principal grounds, which will be addressed in turn, next.

[18] As stated earlier, the appellant submitted that whilst the services would only be subject to service tax if they are "advertising services", the High Court misconstrued the terms of the agreement as well as the form and substance of the agreement. Principally it was contended that under the agreement the appellant is merely renting advertising space from TGV and that the appellant is not receiving any "advertising services" from TGV.

[19] In simple and plain diagrammatical illustration, the appellant highlighted that the respondents had wrongly adopted the following approach:



[20] Instead, the appellant posits that this is the accurate representation of the actual arrangement envisaged in the agreement:



[21] The key question for determination is again whether the payment for the letting of digital advertising space and airtime from a media owner, in this case, TGV, to the appellant, for the purpose of selling or marketing the same to advertisers to advertise their advertisements is subject to service tax under the STA. At its core therefore, the principal issue for determination in this appeal is whether the services provided by TGV to the appellant for the rental of advertising space under the agreement amounted to "advertising services" which are subject to service tax under the STA. Was it merely a rental arrangement or did the transaction between TGV and the appellant in law involve the provision of advertising services by TGV.

[22] We start by stating that the term "advertising services" is not statutorily defined, and as mentioned above, Item 8, Group I of the First Schedule to the STR merely generally describes "all types of advertising services" as the "provisions of all types of advertising services including digital advertising, excluding provision of such services for promotion outside Malaysia".

[23] It is apposite in this context that we highlight the key rules on the interpretation of taxing statutes as recently re-stated by this court in *Ketua Pengarah Kastam v. Metrogold Commercial Sdn Bhd* [2023] CLJU 2612; [2023] 1 LNS 2612; [2024] 2 MLJ 918, which ought to similarly govern the instant case before us, as follows:

> [103] In the first place, a taxing statute ought to be read strictly without reading or implying into it any spirit, intendment or any equities. Only the express words as so legislated matter. In *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1994] 1 MLJ 99 Gunn Chit Tuan CJ (Malaya), for the Supreme Court stated as follows:
>
> > There are ample authorities to show that courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. ***In Re Micklewait*** **it was held that a subject was not to be taxed without clear words**. We realize that revenue from taxation is essential to enable the Government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners*:
> >
> > > ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...
>
> It has also been said by the Judicial Committee in *Oriental Bank Corp v. Wright* 'that the intention to impose a charge upon a subject must be shown by clear and unambiguous language'. (emphasis added)

[104] Secondly, related to the first is that as stated by the Supreme Court in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 the duty of the court, and its only duty, is to expound the language of the statute in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act which it may be called upon to interpret.

[105] Thirdly, any ambiguity in tax statutes ought to be resolved in a construction that favours the taxpayer. This was made clear by the Court of Appeal in *Exxon Chemical (M) Sdn Bhd v. Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428 which followed National Land Finance. Gopal Sri Ram JCA (as he then was) affirmed such interpretation in the following terms:

> [10] In the third place, the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour (see *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1994] 1 MLJ 99). The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally. What learned counsel for revenue is asking us to do is to go the other way. That would be standing the true principle on its head.

[106] Fourthly, a tax statute ought not to be interpreted in a fashion that would result in absurdity or injustice. In *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97 the Federal Court held that whilst Parliament *via* s. 17A of the Interpretation Acts 1948 and 1967 requires the court to adopt a purposive approach, and this includes in respect of a taxing statute, the court is under a duty to adopt an approach that produces neither injustice nor absurdity, but one that promotes the purpose or object underlying the particular statute. *Palm Oil Research* is also an authority for the other trite principle that a subsidiary legislation cannot conflict with the parent statute.

[107] Fifthly, specific words which appear in different provisions of a legislation must be consistently interpreted and applied in the same sense. An important corollary to this is that a statutory provision cannot be interpreted in such a way to negate the effect of another provision of the same statute (see *Cheow Keok v. Public Prosecutor* [1940] 1 MLJ 103).

[24] Now, in order to ascertain the true nature of the business transaction between TGV and the appellant, for all intents and purposes reliance must be principally had on the terms of the agreement. It is also settled law that the construction of contracts such as the agreement is a question of law for the courts to deal with, without the necessity of hearing evidence from witnesses (see the Court of Appeal decision in *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96).

[25] The appellant contended that the services provided does not fall within the meaning of "advertising services" that are taxable services under the STA and that the High Court and the tribunal had misconstrued the agreement between the parties. The appellant submitted that based on the agreement, the appellant was renting advertising space from TGV and was not receiving any advertising service from TGV. The appellant stressed that the agreement showed that the appellant was renting advertising space from TGV.

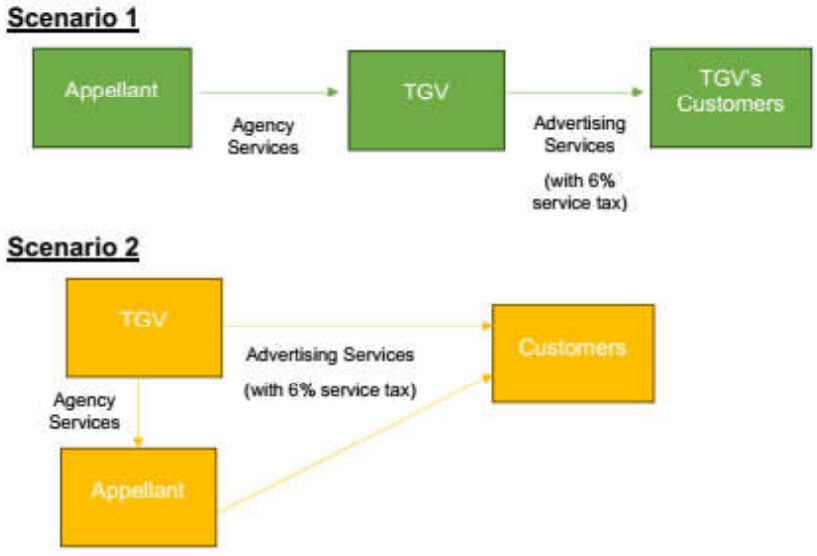
[26] It cannot be denied however, that despite the appellant's insistence that the arrangement was merely the rental of advertising space from TGV, even on a cursory review of the agreement, the same is not a typical rental agreement. In fact, the word "rental" is not used in the agreement at all. There are admittedly however, references to the letting out of advertising space which is specifically identified but there is no less focus on provisions concerning media sales sharing ratio, minimum guarantee payments to TGV and the provision of corporate and bank guarantees in favour of TGV.

[27] Additionally, and unmistakably, this agreement also crucially provides for the appointment of the appellant as the agent of TGV. Its sole agent. Perhaps not, we venture to add, an arrangement usually found in a rental agreement. Why the need for the appointment of the appellant as TGV's agent if the appellant merely needed advertising space to pursue the appellant's business in advertising services.

[28] The appellant maintained, and this distinction is crucial – that it is not acting as TGV's agent to get advertisers for TGV but that instead, the appellant is given the exclusive right to place its customers' advertisements in the advertising space rented from TGV.

[29] According to the appellant, it is also wrong for the respondents to have imposed their own requirements which are not expressly stated in the law as neither the STA nor the STR deems a rental of advertising space to be "advertising services" subject to service tax. The appellant also submitted that despite the decision of the High Court, there is no legal basis for the difference in service tax treatment between a rental of digital advertising space and a rental of non-digital advertising space, and that in any event, the STA and STR do not prescribe rental services as a taxable service subject to service tax.

[30] Before us, the appellant further submitted that if it was truly TGV's agent entering into contracts with customers on TGV's behalf, then the transaction flow ought to either one of the following:



[31] In both scenarios, the appellant maintained that it ought not to be receiving advertising services from TGV, as well as paying for the same. Instead, it would be the appellant who is providing services to TGV and charging TGV.

[32] In our judgment, the terms of the agreement do not bear out the assertions of the appellant. Regard ought to be first had to the recitals to the agreement which provide clearly for these two matters:

> (i) TGV carries on the business of film exhibition and operates Multiplexes in Malaysia. FMN is in the business of providing premium out of home TV media services in Malaysia.
>
> (ii) TGV is desirous *to let out all its advertising space at the Multiplexes to FMN for the purpose of selling and marketing of the advertising space to the Advertisers and to appoint FMN as the agent to sell and market all such advertising space to Advertisers* for display of advertisement and FMN is desirous of such appointment upon the terms and subject to the conditions herein.
>
> (emphasis added)

[33] The above-stated recital II does, it seems to us, as per the highlighted part of the sentence, and considering the sentence structure, as clearly providing for the letting out of advertising space by TGV to the appellant in order to enable TGV undertaking the marketing of such space to advertisers, and for such purpose appointing the appellant as TGV's agent. It does certainly not envisage a purely rental arrangement.

[34] This interpretation is consistent with cl. 2.1 which reads:

> TGV hereby lets out its advertising space at the Multiplexes to FMN for the purpose of selling and marketing all of the advertising space to the Advertisers, for the duration of the Term. In relation thereto FMN is hereby appointed as the sole agent to market and sell all the advertising space subject to the terms and conditions of this agreement.

[35] Again, the focus here is for TGV renting its advertising space to the appellant to market it to the advertisers, and for that purpose the appellant is appointed as the sole agent of TGV. In other words, it is TGV which is selling and marketing its marketing space to the advertisers, which selling and marketing is undertaken by TGV's sole agent, namely the appellant. It is also undisputed that TGV aired the advertisement. This therefore does not support the appellant's contention that it is not acting as TGV's agent to get advertisers for TGV. Its argument that the appellant is given the exclusive right to place its customers' advertisements in the advertising space rented from TGV may not be inaccurate but that does not change the true nature of the relationship between the two. As TGV's agent, the appellant's remit is set out in the agreement, as stipulated by TGV and agreed to by the appellant.

[36] The appellant then submitted that the High Court's reliance on the appointment on the appellant as agent in cl. 2.1 is misplaced as it is, according to the appellant, clear from that clause itself that it is in relation to the letting out of advertising space that the appellant is appointed as agent, and that further cl. 2.2 expressly provides that "notwithstanding cl. 2.1", the appellant shall contract with advertisers "in its own name and capacity" (and not as TGV's agent).

[37] We disagree.

[38] On the first argument that the agreement is merely for the letting out of the advertising space that the appellant is appointed as agent, we have already discussed the construction of cl. 2.1 above. But, we should point out that the appellant in its written submissions (encl. 17) unhelpfully sets out a more 'abridged version' of cl. 2.1 which in our view does not promote the requisite completeness and clarity for an informed adjudication process, as follows:

> TGV lets out its advertising space at the Multiplexes to the Appellant. In relation to this, the Appellant is appointed as the sole agent to market and sell all the advertising space subject to the terms of the agreement.

[39] As for the latter point in respect of cl. 2.1 being qualified by cl. 2.2, we set out cl. 2.2 in its entirety, as follows:

> Notwithstanding Clause 2.1, FMN shall enter into and execute all contracts agreements correspondences and documents with the Advertisers in relation to display of advertisement at the advertising space

A of the Multiplexes in its own name and capacity and shall not use the name of TGV in any manner whatsoever without the prior written consent of TGV.

[40] In our view, this further reinforces the case of the respondents, *vis-a-vis* the fact that the appellant is merely an agent for TGV and as its agent B the appellant is subject to TGV's directions, which in this case in respect of cl. 2.2 is to contract in the appellant own's name. We should add that other clauses in the agreement too reflect other facets of control by TGV as principal over its agent, being the appellant.

[41] The following conclusion as reached by the High Court is therefore C correct:

> [20] The agreement *vide* Clause 2.1 provides that TGV is letting out its advertising space to the appellant who according to the clear words of the clause is its agent to market and sell all the advertising space at the multiplexes subject to the terms and conditions of the agreement. Clause D 2.2 of the agreement begins with the words "notwithstanding Clause 2.1". This would mean notwithstanding what is stated in Clause 2.1, namely, that the appellant is TGV's agent, clause 2.2 requires the appellant to enter into and execute all contracts, agreements, correspondences and documents with the advertisers in its own name and capacity.

E **[42]** The appellant also contended that the finding of the High Court is contrary to the second respondent's own stance which had accepted that the appellant is renting advertising space from TGV under the agreement.

[43] However, by this, we note that the appellant was making reference to the fact that the second respondent had previously in reply to the appellant's F request on 8 May 2020 for confirmation from the second respondent that the rental advertising space from TGV by the appellant is not subject to service tax confirmed that the agreement was a rental agreement. We stress that the appellant renting advertising space from TGV under the agreement is not in dispute.

G **[44]** But, that was the decision of the RMCD (*albeit* subsequently maintained by the second respondent), in its letter of 2 June 2020 and more importantly, that decision by RMCD in actual fact notified the appellant that despite the rental arrangement, the services are also "advertising services" subject to the STA.

H **[45]** We do not therefore see any alleged departure from the second respondent's previous position since it has consistently maintained the key determination that the services envisaged in the agreement are "advertising services", and thus subject to tax.

I **[46]** The appellant also argued that a proper reading of the agreement in its entirety, whilst applying a business and commercial sense approach, would lead one to conclude that the agreement is a rental agreement and not an

agency agreement. It was erroneously found by the second respondent that the appellant is appointed as agent to market and sell the advertising space, without mentioning that this appointment is in relation to TGV letting out or renting the advertising space to the appellant, as per the above mentioned cl. 2.1 of the agreement, and that despite being the appointed agent, under cl. 2.2, the appellant enters into agreements with advertisers in the appellant's own name and capacity.

[47] We certainly do not disagree that courts should be cognisant of commercial business realities and that specifically it is no doubt not uncommon to find media owners renting space to advertising agents. However, we are equally mindful that the true nature of any such arrangement in each particular case must depend on the relationship between the parties under the law, which in respect of the appeal before us is governed by the agreement.

[48] And whilst we agree with the appellant, as we affirmed earlier, that this is a legal issue on the interpretation of the contractual provisions as well as the statutory provisions, the respondents' contention that if the appellant disagreed with the respondents' construction of the agreement, the appellant could have at least offered to call a representative from TGV as a witness during the proceedings before the first respondent tribunal, is not entirely devoid of merit.

[49] We are especially mindful that in the context of the interpretation of commercial contracts, Lord Diplock, for the House of Lords, made this point clearly in *The Antaios Compania Neviera SA v. Salen Rederierna AB* [1985] AC 191, at 201 as follows:

> ... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

[50] Whilst we do not totally discount the other possible interpretation of the agreement – including particularly cl. 2.1 as ascribed by the appellant that the appellant is not acting as TGV's agent to get advertisers for TGV, in our view, a careful reading of other provisions of the agreement and considering the entirety of the agreement (as will be further discussed below) would favour the position taken and rulings made by the respondents.

[51] This is such that in the instant case there are in truth no two possible interpretation that requires the one favourable to the taxpayer to be preferred. There is only one interpretation based on the terms of the agreement. We therefore find no flaws in the following findings of the High Court on this point:

> [24] After considering the DGC's reasons and construing the agreement a whole and applying the principles stated by the Federal Court in *Wong Yee Boon v. Gainvest Builders (M) Sdn Bhd* [2020] 2 CLJ 727]; [2020] 3 MLJ

571, I find that the DGC did not misconstrue the agreement as contended by the appellant nor was there an error of law in arriving at the conclusion that the services *ie*, digital advertising space and airtime amounted to advertising service under Item 8, Group I of the First Schedule of the STR. The intention of the parties is derived from the terms and conditions of the agreement and it is not for this Court to question why they agreed to the terms and conditions in the language they themselves chose. I also found that there were no two competing interpretations and the principle in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464 did not arise. I also found the terms and conditions of the agreement was peculiar and different from the example given in the Royal Malaysia Customs Department's Guide on Advertising Services.

[52] The appellant also made reference to a document entitled *Guide On: Advertising Services* which is published by the Royal Malaysia Customs Department, Sales & Service Tax Division, Putrajaya on 23 August 2018 to reiterate its position that the appellant rents the media space from TGV and uses the same to provide advertising services to the appellant's customers. It is useful to reproduce the entirety of the write-up in para. 12 of the said guide. As follows:

12. For the purpose of service tax, any advertising agency or media owner who provide advertising services which has been prescribed under Group I, First Schedule of Service Tax Regulations 2018 is a taxable service and subject to service tax.

Example 1: Hadeeya Advertising Agency (HAMA) is an advertising agency rented a billboard located at Federal Highway for a period of two years from SSB Sdn Bhd (SSB) who is the owner of the billboard. Later, HAMA advertise on the media space available on the rented billboard. VBX Sdn Bhd (VBX) who is an advertiser, has appoint HAMA to design and put on the advertisement for a period of one year on a billboard for promotion of their new products. Since SSB only rent the billboard and no advertising services provided to HAMA, the renting of the billboard by SSB to HAMA is not subject to service tax as the rental activities is neither taxable nor advertising services. Service tax is chargeable on the advertising services provided by HAMA to VBX which includes the design fees, agency fees, production cost, rental of billboard, cost of permit and approval, lighting cost and others.

[53] We do not find this example to be supportive of the appellant's case. This example merely reiterates the point that the renting of the billboard *per se* (and without more) is not subject to service tax as rental activities are neither advertising services nor taxable. Evidence in this case before us does not show that the respondents rejected that the appellant had rented advertising space from TGV the media owner. That is not the issue. However as discussed earlier, the activities of TGV in this contractual relationship with the appellant is not wholly the provision of rental or letting out services

of its advertising space at the multiplexes, more so when the rental is payable during the rental period regardless of whether or not the space is actually utilised for any advertising, as explained by RMCD in its letter to the appellant dated 2 June 2020.

[54] We therefore conclude on this ground of appeal that we do not accept the appellant's stance that it was also not acting as TGV's agent to procure advertisers by selling and marketing the advertising space to advertisers but that instead the appellant merely had the exclusive right to place the advertisers' advertisements in the advertising space rented from TGV.

[55] We reiterate that cl. 2.1 of the agreement clearly states that "TGV hereby lets out its advertising space at the Multiplexes to the appellant for the purpose of selling and marketing all the advertising space to the advertisers" and "in relation thereto the appellant is hereby appointed as the sole agent to market and sell all the advertising space subject to the terms and conditions of this agreement".

Whether TGV Retains Control And Whether Such Indicates Advertising Services

[56] The appellant highlighted that the first respondent erroneously found and stressed that TGV retains control over the appellant's conduct by reason that all of the airtime, slot and location of the advertisements are subject to TGV's approval and absolute discretion, by reference to cl. 2.3 of the agreement, without stating that TGV's control over the slot and location of the advertisements is only for the LCD video walls and screens (under cl. 2.3(b)) as well as the digital display panels or the digital posters (under cl. 2.3(c)), and not for the commercial on-screen advertising (under cl. 2.3(a)), which as stated above, plainly only provides that:

> The slot and the location of the advertisement referred to in Clause 2.3 (b) and (c) shall be arranged and determined by TGV at its absolute discretion ..

[57] The appellant also submitted that pursuant to cl. 6.1 of the agreement, the appellant must prepare the advertisement at its own cost and expense where it is for the appellant to ensure that all the necessary permits and approvals for the advertisement are obtained; and further, cl. 1.1 of the agreement clearly defines "advertisers" as persons who want to have their advertisements displayed and for this purpose seek the services of the appellant (and not TGV) to obtain the requisite advertising space.

[58] The appellant also challenged the first respondent's stance that the appellant is merely an agent subject to TGV's control and did not have absolute right over the advertisement space as a renter would be, by asserting that there is no provision in the law which provides that a rental of advertising space will amount to advertising services if the person renting is acting as an agent and/or the owner of the space has some form of control over the said person.

[59] Furthermore, the appellant posited that it makes commercial sense for any such owner to retain some form and degree of control (including to impose certain conditions) as the owner would usually ultimately if not directly be liable for certain occurrences on the rented space.

[60] We agree with the appellant that the law does not say that retention of some form of control by the media owner who lets out advertising space would make the media owner also one who provides advertising services.

[61] But we need only say that as noted above, the law describes advertising services generally and is silent on this point of control. Certainly, it therefore falls on the relevant authorities which administer and enforce the STA – the RMCD – to make the necessary determination and take subsequent actions. Surely, they would apply the law as they administer it to the facts of each case, which would be peculiar for each particular case.

[62] For this same reason, whilst there is, as correctly mentioned by the appellant, no provision in the law that provides for a difference in service tax treatment between a rental of digital advertising space and that of non-digital advertising space, the apparent distinction made by the respondents in respect of digital and non-digital advertising space is warranted in a way that the RMCD had clarified in its letter to the appellant dated 2 June 2020 – in that by its very nature digital airtime advertisement in any case requires the involvement and control of the media owner. And this has nothing to do with the fact that the phrase "digital advertising services" in Item 8, Group I of Schedule 1 to the STR was only added by virtue of the Service Tax (Amendment) (No. 2) Regulations 2019 which came into operation on 1 January 2020. In any event, the non-reference to the phrase "digital advertising services" previously cannot be construed to mean that it was then not part of advertising services.

[63] And even in respect of the slot and location of the advertisements for the commercial on-screen advertising under cl. 2.3(a) which the appellant highlighted are not subject to TGV's approval and absolute discretion (unlike for LCD video walls and screens as well as the digital display panels or the digital posters), such commercial on-screen advertising must still under cl. 2.3(a)(i) include advertisements by TGV, including through cross-promotion directly participated by or with TGV and under cl. 2.3(a)(ii) allow for public service announcements which contents must be approved in writing by TGV.

[64] We do not share the appellant's contention that taking into consideration elements of control will lead to absurd results as it is said to be common for owners to retain some form of control in a rental agreement. This is because in our view the features and degree of control must be carefully scrutinised, including such as whether they relate to either merely administrative or substantive business controls, for each case will have to be

examined on its own peculiar facts. In the instant case, cl. 7.3 of the agreement for instance provides for TGV's overarching control on any advertisement material, in that:

> Notwithstanding the above, TGV reserves the right to review and reject any advertisement material due to any reasons whatsoever. Upon TGV's decision to reject any advertisement material, TGV shall provide the reasons for rejection to FMN to avoid future similar advertisement.

[65] We again emphasise that the example referred to in the above stated guide issued by the RMCD is a straightforward, even more common one which involves pure letting out of advertising space by the media owner.

[66] Here though, before us, we see a number of features that exhibit the involvement of TGV as the media owner – and this is on top of TGV's appointment of the appellant as its agent – beyond the usual role of an owner merely letting out its advertising space. This in turn almost inevitably signifies the involvement of TGV in the provision of the advertising services itself.

[67] We therefore conclude our examination of this ground by emphasising that the terms of the agreement did not support the appellant's position that it was not acting as TGV's agent to get advertisers. Instead, the agreement provides that TGV did not relinquish control of the digital advertising space and airtime. We therefore agree with the following observation of the High Court:

> [21] Further according to Clauses 2.3(a), 2.3(b), 2.3(c), 6.1 (a), 6.1(b) and 7.3 of the agreement, TGV retains control over what the appellant does over all the advertisements of the advertisers. The advertisement space is also for any advertisements by TGV, its related/associate companies and any individual, sole proprietorship, firm or body corporate through sponsorship's and cross-promotions directly participated by or with TGV. This shows that TGV is still in control of the digital space and airtime.

Whether Revenue Sharing Mechanism Shows Advertising Services

[68] Further, we reiterate that despite the appellant insisting that the arrangement contemplated in the agreement is one of rental of advertising services, there is no mention of rental payment at all. Instead, there is a revenue sharing mechanism between TGV and the appellant as the agent. The relevant clauses read as follows:

> Clause 3.1: Sharing *ratio*
>
> All Media Sales receivable by FMN from advertisers pursuant to Clause 2.3 shall be shared by TGV and FMN respectively as follows:
>
> (i) for revenue share up to Ringgit Malaysia Fifteen Million (RM15,000,000.00), the ratio shall be 60:40;

(ii) for revenue share exceeding Ringgit Malaysia Fifteen Million (RM15,000,000.00) and up to Twenty Million (RM20,000,000.00), the incremental revenue will be shared 65:35; and

(iii) for revenue share exceeding Ringgit Malaysia Twenty Million (RM20,000,000.00), the incremental revenue will be shared 70:30.

[69] There is even a minimum guarantee payment provision which states thus:

> Clause 3.2 : Minimum guarantee
>
> The base or minimum guarantee ("Minimum Guarantee") shall be Ringgit Malaysia Twelve Million (RM12,000,000.00) for all 3 years of the Term and shall be pegged with the annual admission of twenty-one million (21,000,000) to the Multiplexes ...

[70] We understand that the appellant's position is that cl. 3.2 which provides for "minimum guarantee" is in respect of fixed rental fee. The appellant also asserted that the second respondent failed to state that the minimum guarantee of RM12 million which is to be paid by the appellant to TGV is in fact irrespective of the amount of revenue. The reality is without TGV, the appellant cannot air any advertisement but according to the appellant this does not equal to TGV providing advertising services to the appellant. In the absence of the requisite space, the appellant simply had to rent. Above all, the appellant submitted that there is no provision in the law which states that rental services will amount to advertising services merely because there is a revenue sharing mechanism.

[71] In the first place, we must emphasise that what have been agreed by contracting parties should be given effect to. The Federal Court in *Michael C Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267; [1986] 1 MLJ 45 (TAB 3 IOP) had ruled, thus:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which best will effectuate the intention of the parties, to be collected from the whole agreement.

[72] This reinforces the rule that construction of contracts is to be based on the plain and ordinary meaning of the provisions of the contracts, having regard to the entirety of the contractual context, barring genuine ambiguities. In the Court of Appeal decision in *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786; [2009] 2 AMR 50, Abdul Malik Ishak, JCA stated the following key principles:

> [15] Of course, it is trite that when interpreting a contract, the language of the contract must be taken into consideration. The intention of the parties is to be primarily gathered from the language employed in the contract itself. If, and only if the language is vague, the surrounding

circumstances may be looked into in order to assist in interpreting the contract (*Bipin Behan Deb v. Masrab Ali and Others* [1961] AIR Vol. 48, 173 Assam).

[16] I am fortunate that the contract here is in writing and so the parties are confined within the four corners of the document in which they have chosen to seal their agreement and neither of them can adduce evidence to say that his intention has been misstated or overlooked in the agreement or that some essential features of the contract has been omitted or ignored. To allow such evidence would involve the plain violation of s. 92 of the Evidence Act 1950 (*Afshar M. M. Tacki v. Dharamsey Tricamdas* [1947] AIR (34) 98 Bombay).

[73] As stated earlier, the agreement before us does not even mention rental payments to the effect that the totality of the agreement shows that the business arrangement between TGV and the appellant is far from being purely rental but has extended even further beyond that, into the realm of the provision of advertising services by TGV itself to the appellant. Still, we would accept that there is plainly a letting out of advertising space that must surely warrant rentals to be expended as consideration in favour of TGV as the media owner.

[74] But we have to disagree with the contention that just because there is no provision in the law which states that the presence of a revenue sharing mechanism would render rental services to be advertising services, such rental services can never amount to advertising services. Again, we reiterate that the arrangement before us is not merely rental, and features such as the revenue sharing mechanism – so explicitly drafted into the agreement in comparison to the conspicuous absence of any standard provisions on rentals – further bolsters the case of the second respondent as affirmed by the first respondent that TGV also provides advertising services. Essentially, the agreement provides that all media sales received by the appellant from the advertisers must be shared with TGV, in ratios favourable to TGV, with a guaranteed entitlement for TGV in respect of such sales to be not less than RM12 million for each quarter during the three-year term of the agreement.

[75] The appellant maintained that there is nothing unusual about a revenue sharing mechanism, and that it is a common commercial arrangement to have a fixed rent plus a variable amount based on revenue or sales for rental agreements, such as the rental of lots in shopping malls.

[76] However, whilst we note the appellant's argument that even the second respondent accepted that there is a fixed rent and performance rent under the agreement, as is evident in the RMCD's letter dated 2 June 2020, it must be pointed out, again, that the issue is not whether there is a rental arrangement but whether the rental arrangement extends to the provision of advertising services which is subject to the STA.

[77] The second respondent concluded on this point in the said letter as follows:

> 3. Walau bagaimanapun, merujuk situasi yang diberikan oleh pihak tuan, perjanjian sewaan yang terlibat di antara Focus Media Network Sdn Bhd (FMN) dan media owner (TGV Cinemas Sdn Bhd) adalah sewaan ruang pengiklanan secara digital. Layanan cukai perkhidmatan bagi sewaan ruang pengiklanan secara digital atau airtime dan bukan digital adalah berbeza kerana bagi sewaan ruang pengiklanan secara digital atau airtime, media owner masih mempunyai kawalan ke atas ruang pengiklanan tersebut dan setiap kali iklan ditayangkan ianya adalah dilakukan oleh media owner tersebut. Penyewaan ruang pengiklanan secara digital atau airtime ini adalah masih dianggap sebagai perkhidmatan pengiklanan dan ianya tertakluk kepada cukai perkhidmatan.
>
> 4. Oleh yang demikian bayaran sewaan yang dikenakan oleh media owner kepada FMN dalam bentuk sewaan tetap (fixed rental fee) mahupun sewaan mengikut prestasi (performance rental fee) adalah tertakluk kepada cukai perkhidmatan.

[78] In spite of the clear and express language of the agreement, the appellant sought to convince this court to interpret the agreement differently, and tried to do so, without much substance. It is for the appellant to prove that the guarantee is a fixed rental fee. As mentioned, they did not even offer to summon any witness from TGV to support its case.

[79] The fact that there is a revenue sharing mechanism between TGV and the appellant therefore signifies that there are advertising services provided by TGV that entitled them to the revenue. Thus, it is not a fixed rental fee in a pure rental agreement as contended by the appellant.

[80] The appellant posed the question as to why would the appellant purchase advertising services from TGV only to then provide advertising services to its customers as TGV's agent. And that if the appellant is providing advertising services to its customers as TGV's agent, then would the advertising services not be provided by TGV (as principal) to the customers, and not to the appellant. In such scenario, why would the appellant pay TGV for advertising services when it would make more business sense for TGV to pay the appellant for its services for being a marketing agent for TGV.

[81] We would only need to reiterate, in response, three points. First, the arrangement between the appellant and TGV is as stated in the agreement which, to state the obvious is an agreement containing terms and conditions entered into and agreed by the appellant and TGV. The appointment of the appellant as agent, the absence of a clear rental payment provisions, the presence of the revenue sharing mechanism and advertisement control features vested in TGV, among others, are all key clauses agreed to by the parties. There is no suggestion by either of the contracting parties that any of the provisions of the agreement is not what they had agreed to.

[82] We repeat the point made earlier, this time by referring to another authority in the form of the decision of the Federal Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, where Gopal Sri Ram JCA (as he then was) held that:

> The meaning of the agreement is to be discovered from the words which they have used and read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

[83] Secondly, no matter how parties label and arrange their business relationship, if under the law it amounts to the provision of advertising services by TGV to the appellant under the STA and the STR, then it is taxable. Thirdly, parties expressly agreed in the agreement to the appointment of the appellant as the sole agent for TGV to market and sell all the advertising space subject to the terms and conditions of the agreement. In other words, the scope of the actual authority of the agent is therefore to be ascertained from the terms of the agreement between principal and agent. Nothing out of the ordinary here at all. The Contracts Act 1950 states in s. 139 that the authority of an agent may be expressed or implied. Here, the agreement expressly sets out the extent and limit of the agent's authority.

[84] This therefore provides a complete answer to the questions posed by the appellant on the nature of the relationship and on what the appellant contended to a more commercially structured arrangement.

[85] On top of all that, it cannot be overlooked that as a matter of fact, from the TGV's own conduct of already charging 6% service tax in its invoices, it is recognising that it is rendering advertising services to the appellant that attracted service tax.

Conclusion

[86] We find that based on the agreement, TGV as the media owner had provided digital advertising space and airtime to the appellant, as its agent, which is an advertising agency, with a revenue sharing mechanism as set out in cls. 3.1.and 3.2 of the agreement.

[87] We agree with the determination of the High Court that even though couched in a form of a rental agreement, the arrangement between the appellant and TGV is also essentially of advertising service being provided by TGV. TGV as the media owner provides digital advertising space and airtime to the appellant, as its sole agent, which is an advertising agency with a revenue sharing mechanism, appointed to sell and market advertising services for TGV. The appellant would identify suppliers of advertising space such as cinema operators (hence, TGV) and act as TGV's agent.

[88] The supply of such advertising space by TGV is in our view a type of advertising service falling within Item 8, Group I of the First Schedule to the STR, and thus subject to service tax under s. 7(a) of the STA.

[89] The High Court was, as such, correct in finding that the respondents did not misconstrue the agreement and that there was no error of law in arriving at the impugned decision that the provision of digital advertising space and airtime services by TGV amounted to advertising service under Item 8, Group I of the First Schedule to the STR based on the proper interpretation of the terms and conditions of the agreement.

[90] In view of the foregoing analysis and reasons, we find no appealable errors in the decision of the High Court to warrant our intervention. We therefore affirm the decision of the High Court and dismiss this appeal, with costs to the second respondent.